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AMR MOHSEN

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMR MOHSEN, Defendant.	No. CR 03-95-WBS DEFENDANT AMR MOHSEN'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS 1-4, 10, 14, 16-20 Hon. William B. Shubb

Defendant Amr Mohsen, through his attorneys Bruce Locke and John Balazs, hereby moves for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a) on counts 1-4, 10, 14 & 16-20. The standard in determining a Rule 29 motion for judgment of acquittal is the same as the standard used to determine whether the evidence is sufficient to sustain the verdict: whether viewing all the evidence in the light most favorable to the government, any rational juror could find the essential elements of the crimes proved beyond a reasonable. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "When there is an innocent explanation for a defendant's conduct as well as one that suggests that the

defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one." *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992).

ARGUMENT

A. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION ON COUNTS 1-4, 10 &19 BECAUSE THE GOVERNMENT HAS FAILED TO PRESENT EVIDENCE TO SHOW BEYOND A REASONABLE DOUBT THAT DR. MOHSEN'S STATEMENTS AND THE 1998 NOTEBOOK WERE RELEVANT TO ANY ISSUE IN THE PATENT LITIGATION.

1. COUNTS 1-4 & 10

The conspiracy to commit perjury, the perjury, and the subornation of perjury charges require that the government prove that the statements alleged to be perjurous were material to the matters before the district court.

The false testimony in this case is not perjurous unless it is "material" to the case in which the testimony was given. In order to be material, the testimony must be "relevant" to an issue in the case.

In a criminal prosecution for perjury where the allegedly perjurous testimony was given in a case that actually went to trial, the government would be required to prove the materiality of the false statement by introducing transcripts of the trial to show exactly what issues were before the judge or the jury. *See United States v. Leon-Reyes*, 177 F.3d 820 (9th Cir. 1999) in which the Court affirmed a conviction where the government introduced summaries of the transcripts of the trial testimony to prove that the defendant's testimony was relevant to the issue of where the defendants in the criminal case got the money that the government claimed came from illegal drug sales. *See also United State v. Lococo*, 450 F.2d 1196 (9th Cir. 1971) where the Court held that the defendant's false testimony prevented the grand jury from learning of the connection of the subject of their investigation to a known gambler and therefore hindered the grand jury's investigation; *United States v. McKenna*, 327 F.3d 830 (9th Cir. 2003), where the Court of Appeals made a detailed analysis of the case in order to establish that the deposition testimony was relevant to the issues that were litigated at trial.

The government's burden of proof is not reduced by the fact that the civil patent case did not actually go to trial; the government must still prove beyond a reasonable doubt that the allegedly perjurous testimony was material to an issue that would have had to be decided by the jury or the judge in the civil patent case. This burden is actually made more difficult by the fact that the case never went to trial. We submit that the government in this case must prove beyond a reasonable doubt that the allegedly perjurous testimony was relevant to an issue that the jury would have been required to decide in the civil case. In fact, it may be so speculative whether the 1988 notebook and the testimony are relevant to an issue in the case that the defendant cannot be convicted of perjury. See *United States v. Aguilar*, 515 U.S. 593 (1995), discussed in more detail below.

In this case, there is no dispute but that the 1988 notebook and Dr. Mohsen's testimony concerning the notebook would only be relevant to an issue in the civil patent case if there existed prior art that (1) invalidated the '069 patent and (2) came into existence between the date of the first entry in the 1988 notebook (July 31, 1988) and the date that the '069 patent was filed (September 20, 1989), the presumed conception date. Mr. Jeffrey Miller, the government's first witness stated as much in his response to the first question asked of him on cross-examination.

> Q. Locke: Mr. Miller, would you agree with me that if there were no prior art alleged to invalidate a patent then the notebooks would be irrelevant to any patent case?
>
> A. If there were no prior art?
>
> Q. Yes.
>
> A. And we were not making any invalidity defense?
>
> Q. That's right.
>
> A. Yeah, I think that's true.

Reporter's Transcript (RT) at 180, lines 8 - 14.)

In this case, the government through Mr. Miller has established that in the civil patent case, QuickTurn originally asserted 6 prior art defenses against the '069 patent. In April of 2000 QuickTurn reduced these 6 prior art defenses to 3 prior art defenses. (In the

words of Mr. Miller, QuickTurn set those other 3 prior art defenses aside.)

As a result, at the end of the government's case, there is evidence that QuickTurn had served pleadings alleging several prior art defenses and had "set aside" some of those prior art defenses for "strategic" reasons. As the evidence now stands, the 1988 notebook might be relevant or it might not, depending on whether, for instance, Aptix filed and won a motion for partial summary judgment that none of the prior art actually invalidated the '069 patent.

The government has not, however, introduced any evidence that would support a jury verdict that any of that prior art would actually have invalidated the '069 patent. No witness has explained to the jury how the prior art would invalidate the '069 patent. Since the only evidence is that there were pleadings filed, and since not all pleadings actually result in issues that are litigated at trial, it is possible that the 1988 notebook would not be relevant to any issue and it is also possible that the 1988 notebook would be relevant to an issue in the case. As such, where the best that can be said is that it is possible that the notebook would be relevant and also possible that it would not be relevant, there is insufficient evidence from which a reasonable juror could conclude that the government has proved beyond a reasonable doubt that there actually was an issue in the case to which the 1988 notebook would be relevant. In fact, there was no government witness who even offered an opinion that any of the prior art actually would invalidate the '069 patent.

This case contrasts starkly with *Leon-Reyes*, *Lococo*, and *McKenna*, where in each case the government went to great lengths to establish exactly how the allegedly perjurous testimony was relevant to an issue in the case. In fact, in this criminal case, the government attorneys have stated on the record that they do not believe that it is their burden to prove what issues would have been litigated in the civil patent trial. As government counsel has stated on many occasions, it is not possible to prove what would happen in the trial because the trial never took place. As a result, the government apparently is satisfied to prove up a situation where it is possible that the 1988 notebook could be relevant to some issue in the case and where it is also possible that the 1988

notebook might not be relevant to an issue in the case. But that is not what the government's burden is in this case. The government must prove beyond a reasonable doubt that there existed an issue in the civil patent case to which the 1988 notebook would have been relevant. The government has not met this burden. And where the government fails to meet its burden, it is incumbent upon the Court to grant a judgment of acquittal.

2. Counts 1 & 19

Dr. Mohsen is also charged with conspiracy to obstruct justice and obstruction of justice.

In *United States v. Aguilar*, 515 U.S. 593 (1995) in an opinion by Justice Rehnquist, the Supreme Court held that in order to be guilty of obstruction of justice, the defendant's actions must have had the "natural and probable effect" of interfering with the due administration of justice. Justice Rehnquist stated, in pertinent part,

> The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. *United States v. Brown, 688 F.2d 596, 598 (CA9 1982)* (citing cases). Some courts have phrased this showing as a "nexus" requirement--that the act must have a relationship in time, causation, or logic with the judicial proceedings. *United States v. Wood, 6 F.3d 692, 696 (CA10 1993); United States v. Walasek, 527 F.2d 676, 679, and n. 12 (CA3 1975).* In other words, the endeavor must have the "'natural and probable effect'" of interfering with the due administration of justice. *Wood, supra, at 695; United States v. Thomas, 916 F.2d 647, 651 (CA11 1990); Walasek, supra, at 679.* This is not to say that the defendant's actions need be successful; an "endeavor" suffices. *United States v. Russell, 255 U.S. 138, 143, 65 L. Ed. 553, 41 S. Ct. 260 (1921). . . .*
>
> Although respondent urges various broader grounds for affirmance, we find it unnecessary to address them because we think that the "nexus" requirement developed in the decisions of the Courts of Appeals is the correct construction of § 1503.

Aguilar, 515 U.S. at 528-529, emphasis added. In the *Aguilar* case, Mr. Aguilar, who was a federal district judge in the Northern District of California lied to an FBI agent. The Supreme Court held that the lie to the FBI agent could not support an obstruction of justice charge where the agent might or might not testify before a grand jury. In order to support a conviction for obstruction of justice, the lie must have the "natural and probable effect" of interfering with the due administration of justice. Where the evidence only showed that the

defendant testified falsely to an investigating agent, the Supreme Court held that the use of the testimony was so speculative that the testimony could not be said to have the "natural and probable effect" of obstructing justice. *Id.* at 598 - 602.

Applying the *Aguilar* case to Dr. Mohsen's situation, in order to prove Dr. Mohsen guilty of obstructing justice, the government would have had to show that Dr. Mohsen's attempt (the endeavor) had the "natural and probable effect" of interfering with the administration of justice. An endeavor that involved the falsification of a notebook and false testimony that was not relevant to any issue in the case would not have had the "natural and probable effect" of interfering with the administration of justice because such action would not have had any effect on the resolution of the case. Therefore, since the government has not introduced any evidence from which a reasonable juror could have determined beyond a reasonable doubt that the 1988 notebook or the testimony concerning the notebook were relevant to any issue in the case, that same reasonable juror could not have determined beyond a reasonable doubt that Dr. Mohsen obstructed justice or conspired to obstruct justice.

Stated another way, a person cannot obstruct justice by falsifying a notebook that will never be introduced into evidence in a civil case. Nor can a person obstruct justice by lying about a notebook that is not relevant to any issue in the case. Neither the notebook nor the testimony will have a "natural and probable" effect on the due administration of justice because, since they are both irrelevant to any issue in the case, the notebook and the testimony will actually have no effect on the case.

B. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION FOR PERJURY ON COUNTS TWO AND THREE BECAUSE DEFENDANT AMR MOHSEN'S ANSWERS ARE LITERALLY TRUE.

In *Bronston v. United States*, 409 U.S. 352 (1973), the Supreme Court held that a perjury conviction could not be sustained where the defendant's answer was literally true, even though it may have also been unresponsive and misleading. *See also United States v. Sainz*, 772 F.2d 559, (9th Cir. 1995) ("Under the teachings of *[Bronston*], a literally true

answer, even though unresponsive or 'shrewdly calculated to evade,' cannot form the predicate for a perjury conviction"). "[T]he perjury statute is not to be loosely construed" and "precise questioning is imperative as a predicate for the offense of perjury." *Bronston*, 409 U.S. at 361-62.

Here, because Dr. Moshen's negative answers to counts two and three are literally true, they cannot provide the bases for perjury convictions. Count two asks whether Dr. Mohsen ever delivered the original "notebooks" to his attorneys or an independent expert in order to get the results of the tests on those "notebooks." Count three asks whether, other than the limited periods for attorneys in the litigation to copy the notebooks, the original of those "notebooks" were ever out of his possession.[1] In both instances, Dr. Mohsen answered in the negative to questions that asked about notebooks in the plural. The evidence at trial showed at most that Dr. Mohsen had delivered only the 1988 notebook to one or more experts at the time he was asked the questions about "notebooks" that are charged in counts two and three. His "no" answers to both questions were thus literally true--even if misleading--because he did not deliver (or have outside his possession) more than one notebook. To the extent his answers evaded the questions or were misleading, it was the burden "of the questioner to pin [Dr. Mohsen] down to the specific object of the questioner's inquiry." *Bronston*, 409 U.S. at 575.

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[1] The exact questions and answers charged in counts two and three are set forth below:

> Q. Did you ever deliver the original notebooks to [Aptix's attorneys] or an independent expert so that they could do an independent test on those notebooks to see what the tests would show?
> A. No.
> Q. You never did that yourself?
> A. No.

Count 2.

> Q. Other than the limited periods of time necessary to make copies by both your lawyers and [Quickturn's lawyers], were the original notebooks ever out of your possession?
> A. No.

Count 3.

A hypothetical illustrates this point. If a child eats a single cookie and responds "no" when his or her mother asks whether he ate the "cookies" in the jar, the child's answer is literally true. The child ate one cookie--not cookies. The child may have misled his mother, but his answer is not perjurous.

Although a single out-of-circuit decision rejected a similar argument, this decision is easily distinguishable (as well as being unpersuasive). In *United States v. Williams*, 552 F.2d 226 (8th Cir. 1977), the Eighth Circuit rejected the defendant's argument that his statements were literally true when he answered questions concerning whether he had accepted money in exchange for the lease of liens (plural) because the evidence showed that he only accepted money to release one lien and not to release more than one lien. *Id.* at 229. *Williams* is distinguishable, however, because the court found that the defendant clearly understood the use of the plural in the question to include the singular because he used the terms "lien" and "liens" interchangeably in other parts of his testimony. *Id.* No such similar testimony was presented here. Finally, the *Williams* court gives short shrift to the literally true doctrine and its holding has not been followed in the Ninth Circuit.

In sum, because Dr. Mohsen's statements charged in counts two and three were literally true, the Court should enter a judgment of acquittal on the perjury charges in counts two and three.

C. THE EVIDENCE IS INSUFFICIENT ON COUNTS 14 AND 16-18 BECAUSE THE MAILINGS SET FORTH IN THOSE COUNTS WERE NOT INCIDENT TO AN ESSENTIAL PART OF THE CHARGED FRAUD SCHEME.

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Schmuck v. United States*, 489 U.S. 705, 710 (1989) (quoting *Kann v. United States*, 323 U.S. 88, 95 (1944)). To support a conviction under the mail fraud statute, "the mailing must be 'for the purpose of executing the scheme.'" *United States v. Maze*, 414 U.S. 395 (1974) (*quoting Kann*, 323 U.S. at 94). Although the use of the mails need not be an essential element of the

scheme, the mailing must be "incident to an essential part of the scheme" in order to satisfy the statute. *Schmuck*, 489 U.S. at 711 (*quoting Badders v. United States*, 240 U.S. 391, 394 (1916)). "The government may not prevail without demonstrating that the mailings were incident to the execution of the scheme, rather than part of an after-the-fact transaction that, although foreseeable, was not in furtherance of the scheme." *United States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000); *see also United States v. Manarite*, 44 F.3d 1407 (9th Cir. 1995).

In this case, the mailings associated with counts 14 and 16-18 were not in furtherance of the charged scheme to defraud and thus cannot support a mail fraud conviction. With respect to count 14, David Moore testified that, after performing work on the 1989 Day-Timer and the 1988 questioned notebook, he received a $919.85 check in the mail for the work he had completed. RT 384-85; Exhibit 44 (copy of $919.85 check); Exhibit 45 (envelope containing check). Moore testified that he reported his findings to Dr. Mohsen concerning the 1988 Notebook in September 1998, RT 367-69, and concerning the Day-Timer on March 4, 1999, RT 382. Moore received the check for this work months later, in the beginning of June 1999. It was sent months after Moore had completed his examination of the notebook and Day-Timer and was not connected to the scheme. The check was collateral or ancillary to the charged fraud; it was not incident to an essential part of the scheme and insufficient to support a mail fraud conviction. *See Henderson v. United States*, 425 F.2d 134, 141 (5th Cir. 1970) ("The mailing is not in execution of the scheme if use of the mails is only collateral or incidental to the scheme, or made after the scheme has been fully consummated or has 'reached fruition.'").

Further, the mailings charged in counts 16-18 cannot support mail fraud convictions because they all concern only the 1989 notebook that is not part of the charged fraud. In particular, counts 16-18 charge:

COUNT	Approximate	Sender	Addressee	Item Mailed

	Date of Mailing			
16	3/1/00	Amr Mohsen	Forensic Examiner	Copies of Notebook Pages
17	3/2/00	Examiner	Amr Mohsen	Test Results on Notebook copies
18	6/1/00	Amr Mohsen	Examiner	$131 Check

The evidence at trial was that the mailings charged in counts 16 and 17 concerned only copies of notebook pages in the 1989 notebook--not the 1988 notebook. Moore testified that, in March 2000, Dr. Mohsen sent him copies of pages from the 1989 notebook to conduct a electrostatic detection apparatus test (EDSA) concerning indentations on the papers. RT 387-88. Moore also performed other tests on the notebook. RT 390-91. Exhibit 47 contains Moore's notes and copies of pages of the 1989 notebook. The mailing of the copies of the notebook pages sent to Moore for testing is charged in count 16 while Moore's mailing to Dr. Mohsen of his test results is charged in count 17. Count 18 charges a mailing by Dr. Mohsen on approximately June 1, 2000 of a check for $131 to Moore for the tests Moore did on the 1989 notebook in March.[2]

Counts 16 through 18 relate only to a 1989 notebook that is not part of the charged fraud. The government charged only that Dr. Mohsen committed fraud in fabricating the 1988 notebook--not the 1989 notebook. Moreover, Moore's undisputed testimony was that the notebooks were provided to him in March 2000. This is after Dr. Mohsen had already testified at multiple depositions concerning the notebooks. His tests on the 1989 notebook were not part of the charged fraud. Indeed, though Moore testified that he conducted tests on the 1989 notebook pages and reported those results to Dr. Mohsen, he neither testified as to what his tests showed nor did he render any opinion as to the authenticity of the 1989

[2] This mailing occurred after the evidentiary hearing in May 2000 and, thus, even in the light most favorable to the government--was sent after the scheme had been completed and was not in furtherance of the mail fraud. "A mailing which occurs after the object of the scheme has been completed is not sufficiently related to the scheme to support a conviction for mail fraud." *United States v. Keenan*, 657 F.2d 41, 42 (4th Cir. 1981).

notebook. Even under the light most favorable to the government, the charged mailings were not "incident to an essential part of the scheme" to defraud Quickturn by fabricating a 1988 notebook and committing perjury in connection with that notebook. *See Lo*, 231 F.3d at 478 ("The government may not prevail without demonstrating that the mailings were incident to the execution of the scheme, rather than part of an after-the-fact transaction that, although foreseeable, was not in furtherance of the scheme."). Rather, the mailings in counts 16-18 concern an unrelated notebook that is not charged as part of the scheme to defraud and cannot serve as the bases to support a mail fraud conviction.

D. THE EVIDENCE IS INSUFFICIENT ON COUNT 20 TO ESTABLISH THAT DR. MOHSEN APPLIED FOR A PASSPORT IN VIOLATION OF THE DISTRICT COURT'S ORDER.

Finally, the evidence is insufficient on count 20. There was no evidence that Dr. Mohsen applied for (or possessed) a passport after April 8, 2003 as charged in count 20. Circumstantial evidence that he was about to travel is not sufficient for a rational juror to conclude beyond a reasonable doubt that Dr. Mohsen applied for a passport. There was no evidence submitted to show what the entry requirements were for U.S. or Egyptian citizens into the Cayman Islands. And, based on the evidence presented at trial, Dr. Mohsen may have been intending to travel to the Cayman Islands or elsewhere using the color copy of his U.S. passport, his naturalization certificate, and/or driver's license. While there was plenty of evidence that he was intending to travel, there was very meager evidence that he applied for a passport after April 8, 2003, which is what Dr. Mohsen is charged with doing to violate his release conditions. Thus, the evidence is insufficient to sustain a conviction on count 20 and the Court should enter a judgment of acquittal.

CONCLUSION

For these reasons, the Court should grant a judgment of acquittal on counts 1-4, 10, 14, and 16-20.

Respectfully submitted,

Dated: February 21, 2006

/s/ Bruce Locke
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/s/ John Balazs
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